SINGAPORE REPORTS

Jeyaretnam Joshua Benjamin v Lee Kuan Yew

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 39 OF 1989
WEE CHONG JIN CJ, THEAN AND CHAN SEK KEONG JJ
30 MARCH 1990

Civil Procedure — Pleadings — Defence — Leave to amend after close of pleadings — Principles to be applied same as that for application to strike out amended pleadings — Whether amendment discloses reasonable defence to the claim

The respondent claims against the appellant for damages and an injunction in relation to an alleged slander published at an election rally of the Workers' Party in 1988. Pleadings having closed, the appellant applied for leave to amend the defence by way of notice under summons for directions. The application was dismissed on the ground that the proposed amendment did not disclose an arguable defence. On appeal, the appellant argued that the amendment should have been allowed as any prejudice could have been compensated by costs, and the respondent could apply later to strike out the amendment.

Held, dismissing the appeal:

(1) In a contested interlocutory application for leave to amend pleadings, the principles to be applied are the same as if the application before the court had been an application to strike out the amended pleadings. The test is whether the part to be added by amendment ought to be struck out as disclosing no reasonable defence to the claim.

(2) The proposed amendment, which in effect contends that the right to freedom of speech and expression is unrestricted, is not tenable. Article 14(1)(a) of the Constitution is subject to the common law of defamation as modified by the Defamation Act (Cap 75, 1985 Ed) and, accordingly, does not in itself afford a defence.

Legislation referred to
Constitution of the Republic of Singapore art 14(1)(a)
Defamation Act (Cap 75, 1985 Ed)

Appellant in person.
Tan Kok Quan (*Lee Han Tiong* with him) for the respondents.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): This appeal arose from the order of Lai Kew Chai J on 18 April 1989, dismissing an application made by the appellant, the defendant in the action, by way of a notice under summons for directions for leave to amend the defence. At the conclusion of the hearing, we dismissed the appeal. We now give our reasons.

The respondent's claim against the appellant is for damages and an injunction in relation to an alleged slander published at an election rally of the Workers' Party held on 26 August 1988. Pleadings having closed, the respondent took out a summons for directions. By a notice under summons for directions, the appellant applied for leave to amend the defence by adding a new paragraph, to be renumbered as para 1 of the proposed amended defence in the following terms:

> This action of the plaintiff seeks to restrict the defendant's constitutional right given to him by art 14(1)(a) of the Constitution of the Republic of Singapore and is therefore an unlawful interference of the defendant's fundamental rights contained in the said article and for that reason not maintainable.

By an order dated 18 April 1989, the learned judge dismissed the application. In his judgment, the learned judge accepted the submissions put forward on behalf of the respondent that leave should not be granted as the proposed amendment did not disclose an arguable defence and that it was an immaterial and useless amendment.

In this appeal, the appellant submitted that the learned judge should have allowed the amendment as any prejudice could have been compensated by costs, leaving it to the respondent, if so desired, to take out the application to strike out the amendment. We disagree. In our view, in a contested interlocutory application for leave to amend pleadings, the principles to be applied are the same as if the application before the court had been an application to strike out the amended pleadings. The question involved is the same. The test is whether the part to be added by amendment ought to be struck out as disclosing no reasonable defence to the claim.

By the proposed amendment, the appellant was in effect contending that the right of freedom of speech and expression conferred by art 14(1)(a) is unrestricted and wholly free of any restraint. In our judgment, this contention is clearly untenable. The constitutional right of freedom of speech and expression is unarguably restricted by the laws of defamation. Article 14(1)(a) is subject to cl (2), which provides that 'Parliament may by law impose — (a) on the rights conferred by clause (1)(a) ... restriction ... to provide against ... defamation ...'. The relevant enactment is the Defamation Act (Cap 75, 1985 Ed). In addition, by enacting the Defamation Act, which was enacted by the Malaysian Federal Parliament as Act 20 of 1957 and was extended to Singapore (by way of modification) pursuant to s 74 of the Malaysia Act 1963 in May 1963, the legislature has clearly intended that the common law relating to defamation, as modified by the Act, should continue to apply in Singapore. The act is premised on that underlying assumption and has to be read against the matrix of the common law. Moreover, the definition of law in art 2(1) of the Constitution includes 'the common law in so far as it is in operation in Singapore'. In our view, it is manifestly beyond argument that art 14(1)(a) is subject to the common law of defamation as modified by the Act and, accordingly, does not, in itself, afford a defence. In our

judgment, the proposed defence, as drafted, was doomed to fall.

Accordingly, for these reasons, the appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *JB Jeyaretnam & Co; Lee & Lee.*

Reported by *Zarinah Marican*

Joo Yee Construction Pte Ltd (In Liquidation) v Diethelm Industries Pte Ltd & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 958 OF 1989
THEAN J
1 MARCH 1990

Contract — Building contract — Provision for direct payment to nominated sub-contractors by employer — Main contractor wound up — Whether provision binds the liquidators of main contractor

Companies and Corporations — Winding up — Application by liquidators to determine question whether direct payment provision contravenes company law — Companies Act (Cap 50, 1988 Ed), ss 280(1) & 327(2)

A winding-up order was made against the plaintiff on 10 February 1989. On 12 September 1986, the plaintiff entered into a building contract ('the main contract') with the government of Singapore ('the government') for the construction of the Blood Transfusion Services/Department of Scientific Services Complex at the General Hospital, Singapore, and International Development and Consultancy Corp Pte Ltd ('Indeco') was appointed for the purpose of administering the main contract. The first, second, third and fourth defendants ('the four defendants') are the nominated sub-contractors for the development. Each of the four defendants, as the nominated sub-contractors, on diverse dates entered into a sub-contract with the plaintiff, and the terms of each sub-contract are identical in all material respects. In respect of works carried out by the plaintiff and the sub-contractors at various stages of the development, certificates of payment under cl 38 of the conditions of the main contract had been issued by Indeco for payments to be made to the plaintiff as the main contractor; included in the certificates were the amounts payable by the plaintiff to the nominated sub-contractors respectively for the works carried out and materials and goods supplied by them, and these amounts were set out in a list annexed to each of the certificates. Up to the date of commencement of liquidation of the plaintiff, 19 certificates had been issued, and payment of the full amount thereunder had been made to the plaintiff. Except in respect of two certificates, namely, certificate nos 16 and 17, the plaintiff had, on receipt of the amount under each certificate, paid the amounts stated in the list to the respective sub-contractors. In respect of certificate nos 16 and 17, though full amounts thereunder had been paid by the government to the plaintiff, certain amounts remain unpaid to the first, third and fourth defendants.

Since the payment under certificate no 19, no further certificate has been issued by Indeco. The plaintiff's liquidators took out this application for determination of whether upon the true construction of cl 20(e) of the main contract, any direct payment made pursuant to the said provision by the government to the four defendants would, having regard to the winding-up order being made against the plaintiff, be in contravention of s 329 of the Companies Act (Cap 50, 1985 Ed). The true issue before the court was whether any direct payment to be made by the government to the nominated sub-contractors pursuant to cl 20(e) of the main contract contravenes the combined operation of ss 280(1) and 327(2) of the Companies Act.

Held, interpreting the clause in favour of the plaintiff:

(1) Upon liquidation of an insolvent company (whether voluntary or compulsory), subject to the rights of preferential creditors and also secured creditors, if any, its property must be applied in settlement of its liabilities pari pasu, and any contract made by the company which provides for a distribution of any of its property for the benefit of one or more of its unsecured creditors which runs counter to or seeks to vary this rule is contrary to public policy, and the law as regards distribution of the insolvent's property under the insolvency legislation must prevail.

(2) If the government elects to make direct payment to the three defendants under cl 20(e) and in consequence deduct these amounts from moneys due or payable to the plaintiff, it is in effect distributing to the three unsecured creditors of the plaintiff sums of money which would otherwise be paid to the plaintiff and form part of the general assets of the plaintiff available for distribution among all its creditors pari pasu. Clearly, the operation of such a contractual provision in the liquidation of the plaintiff would infringe the insolvency law providing for distribution of the insolvent's property pari pasu among its creditors.

(3) If cl 20(e) of the main contract is invoked, it would in the circumstances contravene the combined operation of ss 280(1) and 327(2) of the Companies Act (Cap 50, 1985 Ed); the liquidator is not bound by that clause, and consequently any payment made thereunder to the sub-contractors is void as against him.

[*Editorial Note*: The first to fourth defendants have appealed to the Court of Appeal vide Civil Appeal No 31 of 1990. The fifth defendant has appealed vide Civil Appeal No 30 of 1990.]

Cases referred to

1 *Re Wilkinson, ex p Fowler* [1905] 2 KB 713 (not folld)
2 *Re Tout and Finch Ltd* [1954] 1 All ER 127 (not folld)
3 *Re CG Monkhouse Pty Ltd (in liquidation) and the The Companies Act* [1968] 88 WN (Pt 2) (NSW) 238 (not folld)
4 *British Eagle International Airlines Ltd* v *Compagnie Nationale Air France* [1975] 2 All ER 390 (folld)
5 *Administrator, Natal* v *Magill, Grant & Nell (Pty) (in liquidation)* [1967] 1 SALA 660 (folld)
6 *Re Jeavons, ex p Mackay* (1873) LR 8 Ch App 643 (folld)
7 *Re Johns; Worrell* v *Johns* [1928] Ch 737 (folld)
8 *Barclays Bank Ltd* v *Quistclose Investments Ltd* [1970] AC 567 (refd)
9 *Toovey* v *Milne* (1819) 2 B & A 683; 106 ER 514 (refd)

Legislation referred to

Companies Act (Cap 50, 1988 Ed) ss 280(1), 327(2)